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No. 91-1543

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LUCY M. LONG,

Petitioner

v.

CHIEF ROBERT SMYTHE, MAYOR LOUIS SAURAULLO and BOROUGH OF DARBY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

William F. Holsten, II, Esquire
Jeffrey P. Hoyle, Esquire
HOLSTEN & WHITE
One Olive Street
Media, Pennsylvania 19063
(215) 566-8800
Attorneys for Chief Robert Smythe, Mayor Louis Sauraullo and Borough of Darby

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

QUESTIONS PRESENTED

A. Did the courts below depart from established precedent when they determined under the circumstances of Octavis M. Long's death that the Borough's policy of prohibiting civilian turnkeys from entering holding cells without police officers present did not constitute actionable deliberate indifference to Long's civil rights?

B. Did the courts below depart from established precedent in finding that evidence that Long partially fit a profile of persons potentially vulnerable to suicide alone was insufficient to establish that the Defendants should have known of Long's particular vulnerability to suicide?

TABLE OF CONTENTS

Page

Counterstatement of the Case 01

Reasons for Denying the Petition 05

I. THE DECISIONS BELOW GRANTING SUMMARY JUDGMENT WERE NOT IMPROPER IN LIGHT OF THE RELEVANT DECISIONS OF THIS COURT, THE THIRD CIRCUIT COURT OF APPEALS AND THE OTHER CIRCUITS; THEREFORE, THERE IS NO NEED FOR THIS COURT TO EXERCISE ITS GENERAL SUPERVISORY POWERS 05

A. The Courts Below Did Not Depart From Established Precedent When They Determined Under the Circumstances of Octavis M. Long's Death That the Borough's Policy of Prohibiting Civilian Turnkeys From Entering Holding Cells Without Police Officers Present Did Not Constitute Actionable Deliberate Indifference to Long's Civil Rights 06

B. The Courts Below Did Not Depart From Established Precedent In Finding That Evidence That Long Partially Fit a Profile of Persons Potentially Vulnerable to Suicide Alone Was Insufficient to Establish That the Defendants Should Have Known of Long's Particular Vulnerability to Suicide 19

Conclusion 22

TABLE OF AUTHORITIES

United States Supreme Court Cases: Page

City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed. 2d 412 (1989) ... 07, 15, 16

Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed. 2d 393 (1984) 09

Monell v. Department of Social Services of the City of New York, 436 U.S. 58, 98 S.Ct. 2018, 56 L.Ed. 2d. 611 (1978) 06

Pembaur v. Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed. 2d 452 (1986) 07, 17

Uhler v. AFL-CIO, 468 U.S. 1310, 105 S.Ct. 5, 82 L.Ed. 2d 896 (1984) 06, 08

United Public Workers v. Mitchell, 330 U.S. 75 (1947) 06, 08

United States Court of Appeals Cases:

Colburn v. Upper Darby Township, 838 F.2d 663 (3rd Cir. 1988), *cert. denied,* 109 S.Ct. 1338 (1989) *(Colburn I)* 07, 09

Colburn v. Upper Darby Township, 946 F.2d 1017 (3rd Cir. 1991) *(Colburn II)* ... 07, 09, 10, 12, 14, 16, 17, 19, 21

Freedman v. City of Allentown, 853 F.2d 1111 (3rd Cir. 1980) 09, 11, 12, 19, 21

Popham v. City of Talladega, 908 F.2d 1561 (11th Cir. 1990) 10

Simmons v. City of Philadelphia, 947 F.2d 1042 (3rd Cir. 1991) 07, 09, 12, 13, 15, 21

Torraco v. Maloney, 923 F.2d 231 (1st Cir. 1991) 10

Williams v. Borough of West Chester, 891 F.2d 458 (3rd Cir. 1989) 09, 11, 12, 17, 19

TABLE OF AUTHORITIES – *(Continued)*

Miscellaneous: Page

The Legal Intelligencer, November 6, 1991, at 1, col. 1 18

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COUNTERSTATEMENT OF THE CASE

At approximately 1:00 A.M. on September 8, 1988, several police officers responded to a report of a possible rape in progress. (See Appendix of Appeals from Orders of the United States District Court for the Eastern District of Pennsylvania [hereinafter referred to as App. of Appeal] at 56-59). Upon their arrival at the scene, the officers found Octavis Long on the grounds of a local school involved in what appeared to be an argument with his girlfriend. (App. of Appeal at 60-64). Mr. Long

was loud and uncooperative during the period of questioning by the officers and eventual arrest. (App. of Appeal at 68-73). Mr. Long was arrested and charged with underage drinking, criminal trespass and disorderly conduct. (App. of Appeal at 149-150). The officers then transported Mr. Long to the Darby Police Department where he continued to be loud and uncooperative during processing. (App. of Appeal at 74-77).

Mr. Long was very nearly 18 years old at the time of his arrest. (App. of Appeal at 149-150). After processing, Mr. Long was placed in the juvenile holding cell at the Darby Police Station. (App. of Appeal at 74-77).

Shortly after Mr. Long arrived at the police station Officer Thomas Collins, one of the arresting officers, made a phone call to Mr. Long's mother, Lucy M. Long, the Petitioner here. (App. of Appeal at 78-81). When informed of the charges against her son, Mrs. Long refused to come to the police station to pick him up and requested that the police hold him overnight in order that "it might teach him a lesson." (App. of Appeal at 82-85). Mrs. Long also requested that Officer Collins call her at the end of his shift to remind her to pick up her son. (App. of Appeal at 79). Mrs. Long's refusal to pick up her son was consistent with her previous vow to both her son and his girlfriend that if he was arrested again she would leave him in jail. (App. of Appeal at 86-87). Just after Mr. Long was placed in the juvenile holding cell, Officer Collins informed him that his mother would not be there to pick him up until the morning and said that he should lay down and go to sleep. (App. of Appeal at 88). During the period that Mr. Long was in the holding cell he was checked on regular half-hour intervals by the turnkey, William Sweeney. Two additional checks were made on occasions when Long made noise. (App. of Appeal at 90). Officer Collins also went back to Long's cell to tell him that his mother would pick him up in the morning.

At 2:45 A.M. Officer Cory Kramer heard Mr. Long crying and entered the cell area in an attempt to calm

Long down. (App. of Appeal at 93-97). Officer Kramer asked Long if he was all right and told him that his mother would come to pick him up in the morning. *(Id.)* The officer spent five minutes with Mr. Long, and, by the time he left, Long had calmed down and the officer believed that Long was "fine". *(Id.)*. Officer Kramer left Long and returned to his patrol at 2:50 A.M. *(Id.)*.

At 2:59 A.M. the turnkey, William Sweeney, entered the cell area to check on Long and another detainee. (App. of Appeal at 99). At that time the turnkey found Long hanging in almost a sitting position from a pair of pants tied to one of the bars on his cell door. (App. of Appeal at 195). The officer then proceeded to the squad room where he radioed for Darby Police Officers to return to the station immediately. *(Id.)*.

Darby Borough is only eight-tenths of a square mile in area. Patrolling officers are within a very short distance of the police station at all times. Therefore, when the turnkey called officers to return to the station pursuant to Borough policy, the officers arrived within thirty seconds of the call. (App. of Appeal at 98). At some point before the officers returned, when the turnkey was alone at the station with Long and the other detainee, the turnkey cut Long's pants away from the cell bars without entering the cell. (App. of Appeal at 196).

The officers, who returned within thirty seconds, immediately began CPR on Long and were joined by paramedics by 3:05 a.m.. (App. of Appeal at 103-104). Long was thereafter transported to the hospital where he was pronounced dead.

Long's own mother testified that prior to the night in question, Long had never attempted or threatened suicide, or exhibited any suicidal tendencies. (App. of Appeal at 106-109).

Of the incidents cited by the Petitioner as suicide attempts in Darby Borough in the five years immediately preceding the death of Mr. Long, two of them could not properly be characterized as suicide attempts and another occurred more than five years before Mr. Long's.

(Petition for Writ of Certiorari [hereinafter "Petition"] at 7; App. of Appeal at 228, 239-240, 244). Of the remainder, four incidents did not involve an arrestee who was under the influence of drugs or alcohol. (Petition at 7; App. of Appeal at 227, 233, 234-235, 245). Also of the remainder, two incidents did not involve an article of clothing. (Petition at 7; App. of Appeal at 233 and 241). Importantly, it should be noted that none of these "suicide type" incidents resulted in fatality.

The Plaintiff contends that "one of the arresting officers testified that he knew that an intoxicated individual like Long is at greater risk to harm himself when incarcerated than some other arrested individual". (Petition at 7). However, the quoted testimony does not distinguish between intentional and accidental acts by such intoxicated individuals.

The Plaintiff asserts that its forensic expert offered the opinion that Mr. Long was alive when discovered by the turnkey, that the death process was reversible if prompt resuscitative efforts had been administered to Mr. Long when he was discovered by the turnkey, and that "in all likelihood" Long would therefore have survived with minimal neurologic deficits. (Petition at 9). A review of the record shows that the expert opined that "it was *likely* that Mr. Long was unconscious but still alive at 2:59 a.m., when he was first discovered." (Emphasis supplied). (App. of Appeal at 250). The expert's opinion that Mr. Long was still alive when first discovered was not made with the requisite degree of medical certainty because it was couched in terms of being only "likely." The expert likewise does not base his opinion that the death process was reversible upon the requisite degree of medical certainty. (App. of Appeal at 250). In fact, the only opinion that the expert bases upon a reasonable degree of medical certainty is that Mr. Long's death was due to asphyxia by suicidal hanging. (App. of Appeal at 250).

REASONS FOR DENYING THE PETITION

I. THE DECISIONS BELOW GRANTING SUMMARY JUDGMENT WERE NOT IMPROPER IN LIGHT OF THE RELEVANT DECISIONS OF THIS COURT, THE THIRD CIRCUIT COURT OF APPEALS AND THE OTHER CIRCUITS; THEREFORE, THERE IS NO NEED FOR THIS COURT TO EXERCISE ITS GENERAL SUPERVISORY POWERS.

The Plaintiff challenges the District Court's grant of summary judgment, and affirmance by the Third Circuit Court of Appeals, as to the Borough of Darby and its police chief in his official capacity.[1] The Plaintiff, in the questions presented for review and in the headings summarizing the reasons for granting the Petition, primarily challenges the decisions below which found: (1) that evidence proporting to show that Long "fit the category of those individuals with a suicidal propensity" in a study conducted of jail house suicides, alone, was insufficient to support a finding that the Borough should have known that Long was a suicide threat; and (2) that the Borough's policy prohibiting turnkeys from entering holding cells without police officers present was insufficient to support a finding of reckless indifference to potential, successful, jail house suicides.[2] Plaintiff seeks certiorari based on the assertion that the instant case raises "recurrent and important questions involving the conflicting decisions throughout the jurisdictions and in particular . . . in the Third Circuit," thereby requiring an

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1. Despite the Petitioner's inclusion of the Mayor of the Borough of Darby in its instant Petition, the Third Circuit noted in its opinion below that "Mrs. Long appeals only as to the judgments granted in favor of the Borough and its Police Chief." Petition at 49.

2. To the extent that the Petition challenges other aspects of the decisions below in the text of the argument, this brief will address such issues, however, it is not clear that these other issues are fairly included within the questions presented for review pursuant to Supreme Court Rule 14.1(a).

exercise of this Court's general supervisory authority. Petition at 11. Even the most cursory review of the Petition, however, reflects that it fails to demonstrate any relevant substantive conflict or inconsistency in the Circuit Court's decisions which apply this Court's precedent, but instead merely argues for a relaxation of this Court's established standards of "reckless" and "deliberate" conduct and the burden of proof necessary for their establishment. Because of the lack of a justiciable question for review, the Plaintiff is in effect requesting an advisory opinion regarding the types of conduct this Court may in the future find actionable. This Honorable Court has long held that it will not entertain such requests. *Uhler v. AFL-CIO*, 468 U.S. 1310, 105 S.Ct. 5, 82 L.Ed. 2d 896 (1984); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

For the foregoing reasons the Plaintiff's Petition fails to meet the standard necessary to invoke an exercise of this Court's general supervisory authority and accordingly the Petition should be denied.

A. The Courts Below Did Not Depart From Established Precedent When They Determined Under the Circumstances of Octavis M. Long's Death That the Borough's Policy of Prohibiting Civilian Turnkeys From Entering Holding Cells Without Police Officers Present Did Not Constitute Actionable Deliberate Indifference to Long's Civil Rights.

Pursuant to 42 U.S.C. §1983, municipalities and supervisory municipal officials acting in their official capacities may be liable for federal constitutional violations only if the alleged violations are shown to have occurred pursuant to an official policy or custom. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-36, 56 L.Ed. 2d 611 (1978). Additionally, a municipality can only be liable where an officially adopted or promulgated decision or well settled permanent practice can be shown to

be deliberately indifferent, thereby causing a particular constitutional deprivation. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 1205, 103 L.Ed. 2d 412 (1989); *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1064-65 (3rd Cir. 1991). This Court has stated that: " '[M]unicipal liability under §1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives' by city policy makers." *City of Canton*, 109 S.Ct. at 1205 (citing *Pembaur v. Cincinnati*, 475 U.S. 469, 483-84, 106 S.Ct. 1292, 1300, 89 L.Ed. 2d. 452 (1986) (plurality)). In the context of proving reckless indifference in jail house suicide cases the Third Circuit has placed upon the Plaintiff the "burden of establishing three elements: (1) the detainee had a 'particular vulnerability to suicide,' (2) the custodial officer or officers knew or should have known of that vulnerability, and (3) those officers 'acted with reckless indifference' to the detainee's particular vulnerability." *Colburn v. Upper Darby Township*, 946 F.2d 1017, 1023 (3rd Cir. 1991) (*Colburn II*) (citing *Colburn v. Upper Darby Township*, 838 F.2d. 663, 669 (3rd Cir. 1988), *Cert. denied*, 109 S.Ct. 1338 (1989) (*Colburn I*)).

The crux of the Plaintiff's request for review is that it is necessary for this Court to exercise its general supervisory authority to maintain uniformity in the face of conflicting decisions within the lower courts. Petition at 11 and 30-34. The Petition cites cases from other Circuits, but does not point to any conflict with these decisions. Petition at 30-31. Rather, the Petition discusses only cases within the Third Circuit at any length. The Plaintiff contends that review is necessary here "to avoid any confusion which *may* already exist." (Emphasis supplied). Petition at 31. As evidence of confusion among practitioners, the Petition cites an article in a local legal newspaper. Petition at 32. The argument closes by stating the question that this Court should

decide upon review: "[What] elements are necessary to establish the 'deliberate indifference' standard [?]" Petition at 33.

The Plaintiff's assertions regarding conflicting decisions in the Third Circuit and the necessity of articulating elements to establish the deliberate indifference standard are belied by a statement found elsewhere in the Petition, namely that "an understanding of 'reckless indifference' or 'deliberate indifference' must be derived from fact-specific holdings in cases involving jail suicides." Petition at 16-17. The question arises whether any further articulation of the deliberate indifference standard is necessary in light of the developing body of fact-specific holdings, or even possible without reference to specific factual circumstances. It is fundamental to our constitutional and common law jurisprudence that standards are refined through the application of somewhat general legal principles to specific fact situations and not through the exercise of advisory opinions. *Uhler v. AFL-CIO*, 468 U.S. 1310, 105 S.Ct. 5, 82 L.Ed. 2d 896 (1984); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). It is not necessary for this Court to rearticulate the deliberate indifference standard at this time because the decisions in the Circuits are appropriately applying this standard to specific fact situations.

In the instant case, many unique facts were considered in reaching the decisions below including, but not limited to: the small physical size of the Borough in connection with the policy of requiring a civilian turnkey to call for assistance; the small size of the Borough Police Department; the fact that Mr. Long was being held on a temporary basis at the request of his mother; the belligerent behavior of the Mr. Long; the absence of any prior indications of suicidal tendencies by Mr. Long; and the fact that an officer spent several minutes with Mr. Long and believed he had calmed him down only minutes before he was found hanging in his cell. A determination of deliberate indifference can only be made in light of all these unique facts. A further

articulation of the deliberate indifference standard might be necessary if that standard had been inconsistently applied by Circuit Courts under virtually indistinguishable factual circumstances. This has not occurred here. The Plaintiff contends that in light of these facts the Borough of Darby through its officials was deliberately indifferent to Long and that the decisions below finding no deliberate indifference are in conflict with other cases within the Third Circuit, specifically *Simmons v. City of Philadelphia*, 947 F.2d 1042 (1991), *Williams v. Borough of West Chester*, 891 F.2d 458 (1989), *Freedman v. City of Allentown*, 853 F.2d 1111 (1988), and *Colburn v. Upper Darby Township*, 838 F.2d 663 (1988), *cert. denied* 109 S.Ct. 1338 (1989) (Colburn I). *See also, Colburn v. Upper Darby Township*, 946 F.2d 1017 (3rd Cir. 1991) (*Colburn II*).

In examining claims of municipal liability in custody cases, this Court has stated that jail administrators "are under an obligation to take reasonable measures to guarantee the safety of the inmates themselves." *Hudson v. Palmer*, 468 U.S. 517, 526-27, 104 S.Ct. 3194, 3200-01, 82 L.Ed. 2d 393 (1984). The Third Circuit has stated that "custodial officials cannot be placed in the position of guaranteeing that inmates will not commit suicide." *Colburn I*, 838 F.2d at 669. The Plaintiff in a jail suicide case has the burden of establishing three elements: (1) the detainee had a particular vulnerability to suicide; (2) the custodial official or entity knew or should have known of the vulnerability; and (3) the official or entity acted with reckless or deliberate indifference to the detainee's vulnerability. *Colburn II*, 946 F.2d at 1023 (citing *Colburn I*, 838 F.2d at 669).

The Third Circuit requires a level of culpability higher than a negligent failure to protect from self-inflicted harm in evaluating the three elements in a jail suicide case involving allegations of deliberate indifference. *Colburn II,* 946 F.2d at 1024. The Third Circuit has discussed the first required element as follows:

> The requirement of a particular vulnerability to suicide 'speaks to the degree of risk inherent in the detainee's condition'. As several of our sister circuits have recently pointed out, the requirement of 'reckless or deliberate indifference' implies that there must be 'a strong likelihood, rather than a mere possibility, that self-inflicted harm will occur.'

Id. (citing, *Torraco v. Maloney*, 923 F.2d 231, 236 (1st Cir. 1991); *Popham v. City of Talladega*, 908 F.2d 1561, 1563 (11th Cir. 1990)). Likewise, regarding the "knew or should have known" element:

> There can be no reckless or deliberate indifference to that risk unless there is something more culpable on the part of the official than a negligent failure to recognize a high risk of suicide.

Colburn II, 946 F.2d at 1025.

There is no conflict between the instant case and those cases cited in Plaintiff's Petition as demonstrating a conflict within the Third Circuit. In *Colburn II*, the Third Circuit affirmed the District Court's entry of summary judgment against the Plaintiff where the Plaintiff's decedent, an intoxicated pre-trial detainee, fatally shot herself while in custody at a police jail. The facts involved in *Colburn* were summarized by the District Court in the instant case as follows:

> On the day before she was taken into custody, the decedent had jumped from a window and the police had been summoned; the decedent had 'obvious scars' on her right wrist from a previous suicide attempt; the custodial officer upon searching the decedent found a round of live ammunition in the decedent's pocket, but not the gun with which the decedent later killed herself; and the custodial officer had to prevent the decedent from swallowing Valium pills.

Petition at 71-72.

In *Freedman*, the Third Circuit affirmed the District Court's dismissal where a detainee hung himself in a city jail. *Freedman v. City of Allentown, Pennsylvania*, 853 F.2d 1111 (3rd Cir. 1988). The District Court below in the instant case characterized the relevant facts as follows:

> Plaintiff alleged that the decedent had shown one of the officers 'large prominent scars' on his wrists and neck, which the forensic pathologist later described as 'suicide hesitation cuts.' *Id.* at 1113. Plaintiff alleged that, after the officer viewed the scars, the decedent was placed in a remote cell where he could not be readily observed. *Id.* The third circuit held that the officer's alleged failure to recognize the scars as attempted suicide marks amounted to negligence, at most, and could not support a claim for deliberate indifference. *Id.* at 1116. The Court held that since the officers did not recognize the detainee's suicidal propensity, they were not deliberately indifferent by failing to provide close surveillance of the detainee. *Id.*

Petition at 72-73.

In *Williams*, the Third Circuit affirmed the District Court's entry of summary judgment where a detainee at a borough police department hung himself in his cell with his own belt. *Williams v. Borough of West Chester, Pennsylvania*, 891 F.2d 458 (1989). The facts of *Williams* were summarized by the District Court in the instant case as follows:

> The evidence showed that the decedent had a long history of suicide attempts and mental illness, and that this history was known to many members of the borough's police department. *Id.* at 461. When the decedent was arrested and held in a police cell, the custodial officers neglected to remove his belt. Upon being placed in the cell the decedent was heard banging on the cell block door and yelling. Several

> minutes later, the custodial officers left the police station for at least twenty-five minutes. During this time, the only police department employee in the station was a dispatcher who had no custodial responsibility for prisoners. The dispatcher heard the decedent yelling but did not check the cell. When a custodial officer returned to the police station, he found the decedent dead, hanging from the ceiling by his belt. *Id.* at 462.

Petition at 73-74.

In *Colburn, Freedman* and *Williams*, the Third Circuit held that the custodial defendants were not deliberately indifferent, but at most negligent, because in each case there was insufficient evidence to show that the defendants either knew or should have known of the detainee's particular vulnerability to suicide. *Colburn II*, 946 F.2d at 1026-27, 1029; *Freedman*, 853 F.2d at 1116; *Williams*, 891 F.2d at 465-66.

Rather than creating a conflict, it would appear that the decisions below in the instant case were wholly consistent with the decisions reached under the facts of *Colburn, Freedman* and *Williams*. At first glance, the decisions below may seem inconsistent with the decision in *Simmons*, 947 F.2d 1042 (3rd Cir. 1991). However, when viewed as they must in light of their specific facts, the decisions are not contradictory. In *Simmons*, an emotionally disturbed young man hung himself in a Philadelphia police station detention cell after having been arrested for intoxication. There are many factual differences between *Simmons* and the instant case. *Simmons* involved a large, urban police department, whereas this case involves a very small borough police department. Despite his condition and the minor nature of his offense, no one at the holding facility made any telephone calls on behalf of Simmons. *Id.* at 1049. In this case, officers called Mr. Long's mother and requested that she come to pick up her son, but she insisted that he be kept overnight to teach him a lesson. In *Simmons*,

according to the custodial officer, "Simmons had 'glassy eyes,' was 'in a stupor,' and did not respond when [the custodial officer] told him to sit down and relax." *Id.* at 1050. However, the record here shows that Mr. Long was in no such condition and that an officer spent five minutes with him a short while before he was found hanging, and believed that he was fine. Finally, in *Simmons*, a rescue team arrived at the cell roughly seventeen minutes after the custodian found Simmons' body. *Id.* In this case, on the other hand, the record shows that officers arrived on the scene and began CPR from within thirty seconds to two minutes of the time that Mr. Long was found.

In addition, the Third Circuit below made the following observations concerning *Simmons*:

> The record there contained evidence from which a finder of fact could find that the relevant policy makers for the city (1) knew that 20 jail suicides had occurred in their jurisdiction between 1980-85, of whom 15 were intoxicated, (2) knew before 1981 that intoxicated detainees presented a high risk of suicide, (3) were aware of published standards for suicide prevention, (4) had considered making changes in the City's jail visual surveillance of intoxicated detainees, (5) had received recommendations for such changes of these kinds from experts, including the City's director of mental health services for the prison system, and (6) had failed to implement these recommendations. Here, nothing in the record would support a conclusion that Chief Smythe or any other policy maker for the City shared the kind of culpability that the jury apparently found in *Simmons* on the part of the policymakers or the City of Philadelphia. [3]

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3. In *Simmons*, the Court noted that the Plaintiff had failed to adduce evidence that "policy makers" with final authority had consciously chosen to ignore this information but that the defendant had waived this issue of proof. *Simmons*, *supra* at 1065.

Petition at 61.

In contrast to *Simmons*, in this case: (1) there is no evidence that there were any successful suicide attempts in the five year period immediately preceding the detainee's suicide (App. of Appeal at 225-245); (2) there is no evidence that the relevant borough policy makers knew that intoxicated detainees presented a high risk of suicide;[4] (3) there is no evidence in the record that any of the relevant borough policy makers were aware of published standards for suicide prevention; (4) there is no evidence that any of the relevant borough policy makers had considered making any changes in any policies regarding intoxicated detainees; (5) there is no evidence in the record that any relevant borough policy makers had received recommendations for any changes in borough policy regarding intoxicated detainees from experts; and (6) because the policy makers received no recommendations, there is no evidence in the record that they failed to implement such recommendations.

The Petition specifically challenges the Borough policy whereby turnkeys radio for the assistance of police officers if anything unusual occurs within a cell block and await their arrival to open a cell door. Leaving aside for a moment the Plaintiff's first two elements of proof regarding the detainee's particular vulnerability to suicide, Plaintiff must also point to evidence in the record indicating that the Borough's policy constituted deliberate indifference and that such deliberate indifference caused the detainee's injury. *Colburn II*, 946 F.2d at 1023. The Third Circuit below properly found that:

> Entering a cell without the strength and training necessary to secure a detainee in the event the

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4. The testimony of a borough police officer cited at page 7 of the Petition that an intoxicated individual is at greater risk to harm himself when incarcerated than some other arrested individual is not relevant because the officer is not a policy maker and because his use of the phrase "harm himself" does not distinguish between intentional and accidental harm.

> suicide attempt is a ruse is dangerous not only to the person entering the cell but also to the security of the prison. Given that hazard, we do not think the restriction on untrained turnkeys entering cells can itself be a predicate for a finding of reckless indifference to the lives of the detainees.

Petition at 57. The Borough's policy is not unreasonable in light of the fact that Darby Borough is only eight-tenths of a mile square and patrolling officers can be called back to the station in a matter of moments. This is in fact what occurred in this case. A police officer trained in CPR testified that he arrived at the station within thirty seconds of the time that he was called and began administering CPR.[5] App. of Appeal at 98. The Petition points to other evidence in the record which indicates that the officers may have arrived up to two minutes after being called. However, in either case, the finding of no deliberate indifference by the courts below was not inconsistent with established precedent.

The Plaintiff must also show that the Borough's policy caused the detainee's injury. *City of Canton, Ohio v. Harris*, 109 S.Ct. at 1205. The Plaintiff states that upon finding Mr. Long hanging in his cell "[t]he turnkey did not try to enter the cell and did not try to cut down Long but instead went back to the squad room to radio for help." Petition at 4-5; App. of Appeal at 194-195. The practice of calling for help immediately upon finding someone in trouble cannot be said to be deliberately indifferent. In fact, it is entirely proper. From the time that the turnkey made a call, trained help arrived within thirty seconds to two minutes. During that short time the turnkey proceeded from the squad room back to the detainee's cell and managed to cut the detainee down from his hanging position without entering the cell. App.

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5. In *Simmons*, the primary case relied on in the Petition as representing a conflict, a rescue team arrived approximately seventeen minutes after the custodial officer discovered the detainee's body. *Simmons*, 947 F.2d at 1050.

of Appeal at 196. Taken together, this record evidence, along with the highly speculative expert's report relied on by the Plaintiff, supports the conclusion of the Third Circuit below that a reasonable trier of fact could not find that the Borough's policy was a proximate cause of the detainee's death. Petition at 56.

The Petition also makes reference to other alleged practices of the Borough, but these questions may not have been properly presented for review. The Plaintiff mentions inadequate training but it is not clear whether she refers to training regarding the identification of potential suicide victims or the care of a detainee after a suicide attempt. In either case there was no violation. Regarding the care of detainees after a suicide attempt, the Third Circuit below properly found that there was no deliberate indifference and no causation "in light of the very limited size of the Borough and the evidence that trained officers were continuously available in under two minutes." Petition at 57. Regarding training to identify potential suicidal detainees, all of the evidence shows that this particular detainee never showed any suicidal tendencies, even to his mother and others who knew him best. App. of Appeal at 106-109. "[M]unicipal liability for failure to train cannot be predicated solely on a showing that the [Borough's] employees could have been better trained or that additional training was available that would have reduced the overall risk of constitutional injury." *Colburn II*, 946 F.2d at 1029-30 (Citing *City of Canton*, 109 S.Ct. at 1205-06). Even if this issue is properly presented, the courts below properly determined that the Plaintiff could not meet her burden based upon the record evidence.

The Petition also poses questions regarding the allegation that Mr. Long was placed in an adult cell and that the custodial officer failed to maintain constant supervision. These questions may not have been properly presented for review. Moreover, these particular claims are based solely upon Mr. Long's status as an intoxicated juvenile detainee. In order for the Plaintiff to

prevail, these acts must have been pursuant to a policy of the Borough of Darby. As correctly pointed out by the District Court below, "the Borough's policy entailed releasing juveniles to their parents, rather than detaining them." Petition at 81. The officers held Mr. Long only after they attempted to follow their usual policy of releasing juveniles to their parents and Mr. Long's mother, the Petitioner here, refused to pick her son up and requested that the officers hold him until the morning. App. of Appeal at 82-85. The subsequent actions of the officers in detaining Mr. Long and in supervising his detention cannot be attributed to the Borough as policy because the Borough policy was to release juveniles to their parents. Furthermore, the officers did not have final policy making authority such that their isolated acts could constitute Borough policy. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-83, 106 S.Ct. 1292, 1299-1300, 89 L.Ed. 2d 452 (1986). Because the Borough's policy was to release intoxicated juveniles to their parents, actions challenged based upon the decedent's status as an intoxicated juvenile detainee cannot be said to be pursuant to Borough policy.

The courts below correctly determined that detaining juveniles in an adult facility is not deliberately indifferent. Petition at 58-59, 80-81. The courts below also correctly determined that there was no deliberate indifference where the custodial officer did not maintain constant supervision over Mr. Long. Petition at 59-62, 79-80. This is entirely consistent with the Third Circuit's prior holding that a failure to subject intoxicated detainees to around-the-clock personal surveillance did not constitute deliberate indifference. *Colburn II*, 946 F.2d at 1029; *See also, Williams v. Borough of West Chester, Pennsylvania*, 891 F.2d 458, 467 n. 14 (3rd Cir. 1989). In *Williams*, the Third Circuit found no deliberate indifference where a detainee was not checked for at least twenty-five minutes before committing suicide. *Williams*, 891 F.2d 458.

In summary, the decisions below finding no deliberate indifference and no causation were proper. The Third Circuit decisions cited by the Petitioner as being in conflict with the decisions below are all distinguishable on their facts. In fact, the decisions cited by the Petitioner support the decisions below in this case[6]

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6. The Petition cites an article published in *The Legal Intelligencer*, a local legal newspaper. Petition at 32-33. The Plaintiff contends that "it can be anticipated that the article . . . will cause many attorneys confronted with similar issues to secure copies of the unpublished opinion in *Long* and the opinion in *Simmons* to determine the state of the law." Petition at 32-33. If this occurs, then the article will have served its purpose and the practitioners who secured the copies will have done their job. However, the practitioners will not be confused by conflicting decisions, but rather will find distinguishable applications of the deliberate indifference standard to specific factual situations.

Moreover, the article actually provides support for the denial of the Petition here because it indicates that the conflict within the Third Circuit relied on by the Petitioner does not exist. In discussing the decisions in *Simmons* and *Colburn II*, the article stated in part as follows:

> Although a clear message can be drawn from the one unanimous and one majority opinion, a dissent by Senior Circuit Judge Joseph F. Weiss, Jr., in *Simmons v. City of Philadelphia*, and a strongly worded concurrence by Chief Circuit Judge Dolores Case Sloviter in the same case, stake out opposite positions on the Plaintiff's burden of proof. . . . The majority opinion in *Simmons* by Circuit Judge Edward R. Becker, upholds the $1 million verdict but only because he found the City's lawyers were guilty of a procedural botch. . . . Together *Simmons* and *Colburn II* promise to severely limit future suits, especially where the suicide occurs in a smaller police department or a department where there has never been a suicide before. . . . Becker called the *Simmons* case 'an extremely close one,' and the rulings are hardly definitive. In fact, the only precedential value in the *Simmons* opinion is on the waiver issues: the rest is dicta with each judge articulating different views on the merits of the case.

The Legal Intelligencer, November 5, 1991, at 1, cols. 2 and 3 and at 32, cols. 2 and 3.

B. The Courts Below Did Not Depart From Established Precedent in Finding That Evidence That Long Partially Fit a Profile of Persons Potentially Vulnerable to Suicide Alone Was Insufficienct to Establish That the Defendants Should Have Known of Long's Particular Vulnerability to Suicide

A Plaintiff in a jail suicide case has the burden of establishing that the detainee had a particular vulnerability to suicide and that the custodial authority knew or should have known that vulnerability. *Colburn II*, 946 F.2d at 1023. The Plaintiff, as her second reason for granting the Petition, asserts that the courts below improperly refused to recognize a national profile as evidence that the Borough should have known of Mr. Long's particular vulnerability to suicide. Petition at 34-47. However, the Plaintiff provides no legal authority for the proposition that she asserts. The determinations below that the Borough of Darby did not know and should not have known of any particular vulnerability to suicide on the part of Mr. Long were proper.

The Plaintiff asserts that the answer to the question whether the Borough knew or should have known of Mr. Long's particular vulnerability to suicide "involved a fact intensive scrutiny of the record, inevitably involving the court in the process of 'line-drawing.' " Petition at 34-35 (Citing *Williams*, 891 F.2d at 465, and *Freedman*, 853 F.2d 1111). The courts below scrutinized the facts contained in the record in this case and properly determined that "[t]here is neither evidence nor allegation that the police or anyone else associated with the Borough had knowledge about Long's background that would give reason to believe he was suicidal." Petition at 54. In fact, the record shows that the detainee's mother said that he had never exhibited any suicidal tendency. App. of Appeal at 106-109. That statement is supported by the fact that Mrs. Long was apparently not concerned about any danger that her son might have posed to

himself because she passed up the opportunity to pick him up at the jail and allowed him to stay overnight. App. of Appeal at 82-85.

After pointing out that there was no record evidence of Mr. Long's own particular vulnerability to suicide, the Third Circuit below stated that "Plaintiff relies on expert evidence that Long partially fit the profile of a high suicide risk. . . ." Petition at 54-55. The Petition asserts that the courts below erred in failing to recognize such national profile evidence and in refusing to allow that evidence to go to a jury. Petition at 34. However, the courts below properly determined as follows:

> There is no evidence that any custodian, police officer, or policy setter in the Borough was aware of the degree of suicide risk for juveniles detained in adult facilities testified to by Plaintiff's expert. While that expert testified that the increased risk of suicide with juveniles confined in adult facilities was generally accepted knowledge in his field and should have been known to Borough personnel, liability here requires more than a showing of negligence.

Petition at 60-61. The courts below did not fail to recognize any national statistics. Rather, they considered such statistics and determined that a jury could not find that the relevant Borough policy makers should have known of Mr. Long's "particular vulnerability."

> '[S]hould have known' . . . is a phrase of art with a meaning distinct from its usual meaning in the context of the law of torts. It does not refer to a failure to note a risk that would be perceived with the use of ordinary prudence. . . . The 'strong likelihood' of suicide must be 'so obvious that a lay person would easily recognize the necessity for' preventative action (Citation omitted); the risk of self-inflicted injury must be not only great, but also sufficiently apparent that a lay custodian's failure to

> appreciate it evidences an absence of any concern for the welfare of his or her charges.

Colburn II, 946 F.2d at 1025.

In *Freedman*, the Plaintiff's claim was based upon the fact that the detainee showed large prominent scars on his wrists, inside of his elbows and neck to his custodians prior to the time he committed suicide. *Freedman v. City of Allentown, Pennsylvania*, 853 F.2d 1111, 1116 (3rd. Cir. 1988). The Court stated that it would:

> assume that a reasonably competent prison official should have known and identified these marks as 'suicide hesitation cuts,' as described by the forensic pathologist. Even if so, the failure to recognize them as such, without more, amounts only to negligence and therefore fails to support a claim under section 1983.

Id. The decisions below are reasonable in light of *Freedman*.

The Petition cites the District Court decision in *Simmons* as support for the use of national profile statistics to impute knowledge of suicidal propensity. However, the Third Circuit did not rely on any national profile on appeal in *Simmons*; rather, it relied principally on its assumption that city policy makers were aware that twenty jail suicides had occurred in their jurisdiction during the five year period preceding Mr. Simmons' suicide, and that they were aware of the suicide prevention measures testified to by the Plaintiff's experts. *Simmons*, 947 F.2d at 1070-71. The Third Circuit below specifically pointed to the absence of these facts in this case. Petition at 61 n. 2. The Plaintiff points to no legal authority for her proposition that knowledge of national standards and profiles should be imputed to local custodial officials.

The Plaintiff expresses the concern that this Court might "lay down a rule excluding imputed knowledge

based upon widely recognized and accepted information. . . ." Petition at 41. This Court's denial of the instant Petition would have no such effect.

Finally, even if this Court were to find that the courts below should have considered national statistics to impute knowledge of Mr. Long's particular vulnerability to suicide, such a determination would not automatically render the decisions below reviewable. Rather, the Plaintiff must also show that the Borough was deliberately indifferent through its policy whereby turnkeys do not enter cells without police officers present, and that such indifference caused Mr. Long's injury. As discussed *Supra*, the courts below properly found no deliberate indifference or causation.

CONCLUSION

The courts below did not depart from established precedent when they determined under the circumstances of Mr. Long's death that the Borough of Darby's policy of prohibiting turnkeys from entering holding cells without police officers did not constitute actionable deliberate indifference to Long's civil rights. Therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
HOLSTEN & WHITE

BY: _____
WILLIAM F. HOLSTEN, II, ESQUIRE

BY: _____
JEFFREY P. HOYLE, ESQUIRE
Attorneys for Chief Robert Smythe, Mayor Lewis Sauraullo and Borough of Darby

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